SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 338

N. ALFRED WINN,

*Petitioner*

*versus*

THE FLORIDA BAR,

*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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The Petition of N. ALFRED WINN for Writ of Certiorari respectfully shows:

## DECISION TO BE REVIEWED

THIS PROCEEDING ORIGINATES FROM A FINAL JUDGMENT OF THE SUPREME COURT OF THE STATE OF FLORIDA ENTERED APRIL 30, 1968, SUSPENDING PETITIONER FROM THE PRACTICE OF LAW FOR A PERIOD OF SIX (6) MONTHS UPON DISCIPLINARY GROUNDS.

The decision of the Florida Supreme Court, sitting as a court of original jurisdiction is dated March 20, 1968. Petition for Rehearing was filed on April 3, 1968,

and denied on April 30, 1968, at which time Final Judgment entered. Said proceeding is officially reported as The Florida Bar versus N. Alfred Winn, Case Number 36,450 _____ So. 2d _____, (1968). Copies of the following opinions are appended hereto as designated:

1. Final Judgment, Florida Supreme Court
   Appendix Page 1
2. Order of Florida Supreme Court denying Petition for Rehearing
   Appendix Page 10
3. Judgment, Board of Governors, Florida Bar
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## JURISDICTION

THE GROUNDS UPON WHICH THE JURISDICTION OF THIS HONORABLE SUPREME COURT IS INVOKED ARE AS FOLLOWS:

1. Final Judgment of the Florida Supreme Court suspending Petitioner from the practice of law for a period of six (6) months was dated March 30, 1968. (A-1)

2. Petition for Rehearing was denied by Order of the Florida Supreme Court on April 30, 1968, at which time Final Judgment entered. (A-10)

3. Order of the Florida Supreme Court staying the Judgment of suspension was entered on May 20, 1968, and provided that said Judgment be stayed ". . . to and

including July 1, 1968, to enable respondent to seek review in the Supreme Court of the United States and obtain any further stay from that Court, . . ." (A-28)

4. Order of the Supreme Court of the United States staying judgment of the Florida Supreme Court until filing and disposition of Petition for Writ of Certiorari was entered on July 1, 1968.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH CONFER JURISDICTION OF THIS HONORABLE COURT ARE AS FOLLOWS:

1. Article III, Constitution of the United States,
2. 28 U.S.C.A., Section 1257.
3. Amendments V and XIV, Constitution of the United States.

The judgment of the Florida Supreme Court is in conflict with the case of *Spevack v. Klein*, 385 U.S. 511, 17 L. ed. 2nd 574, 87 S. Ct. 625 (1967).

## QUESTION PRESENTED

THE QUESTION PRESENTED FOR REVIEW IS AS FOLLOWS:

WHETHER PETITIONER, N. ALFRED WINN, WAS COMPELLED TO TESTIFY AGAINST HIMSELF BEFORE A REFEREE OF THE FLORIDA BAR IN SAID DISCIPLINARY PROCEEDING CONTRARY TO THE FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION?

## CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THIS CASE INVOLVE ARE AS FOLLOWS:

(1) AMENDMENT V, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(2) AMENDMENT XIV, SECTION 1, UNITED STATES CONSTITUTION.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) ARTICLE XI, RULE 11.02(4). INTEGRATION RULES, FLORIDA BAR.

"Trust Funds and Fees. Money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose. Money and other property of clients coming

into the hands of an attorney are not subject to counterclaim or setoff for attorney fees, and a refusal to account for and deliver over such property and money upon demand shall be deemed a conversion. This is not to preclude the retention of money or other property upon which the lawyer has a valid lien for his services or to preclude the payment of agreed fees from the proceeds of transactions or collections. Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is extortionate or the demand is fraudulent."

(4) ARTICLE XI, RULE 11.06(7), INTEGRATION RULES, FLORIDA BAR.

"The Respondent. The respondent may be called as witness by The Florida Bar to make specific and complete disclosure of all matters material to the issues. When the respondent attorney is subpoenaed to appear and give testimony or to produce books, papers or documents, and he refuses to appear or to produce such books, papers or documents, or, having been duly sworn to testify, he refuses to answer any proper question, he may be cited for contempt of this court."

(5) RULE 1.450(a), FLORIDA RULES OF CIVIL PROCEDURE.

"Adverse Witness. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party and the witness thus called may be contradicted and impeached by or on behalf of the adverse party only upon the subject matter of his examination in chief."

## STATEMENT OF THE CASE AND FACTS

Petitioner, N. ALFRED WINN, a practicing attorney in St. Petersburg, Florida, was charged by The Florida Bar, under a Two Count Complaint alleging professional misconduct.

The Complaint primarily charged Petitioner with misconduct involving *illegal* and *extortionate* fees contrary to Article XI, Rule 11.02(4), Integration Rules of The Florida Bar promulgated by the Supreme Court of the State of Florida. (A-1, 2)

Pursuant to Integration Rules of the Florida Bar, Petitioner was prosecuted by an attorney appointed by The Florida Bar and was represented by counsel. Hearing upon the Complaint was held before the Honorable William Belcher, Attorney at Law, acting in the capacity as a Referee for The Florida Bar. Under Article XI, Integration Rule, Florida Bar, the function of the Referee is to take testimony, make findings of fact and make recommendations as to punishment of an attorney. The referee in the instant case recommended Petitioner be found Not Guilty as to Count One of the Complaint and Guilty as to Count Two. The referee further recommendeded that Petitioner be reprimanded by The Florida Bar, taxed with costs and placed on probation for an appropriate period of time. (A-14)

At the Hearing before the Referee, Petitioner was called, over objection of his counsel, as an adverse witness by counsel for The Florida Bar and compelled to testify under Integration Rule 11.06(7) and Rule 1.450 (a), Florida Rules of Civil Procedure.

The findings of the Referee were then reviewed by the Board of Governors of The Florida Bar, who concurred in the Referee's finding of Not Guilty as to Count

One and Guilty of Count Two but further concluded that the Petitioner's fee to his client was *"illegal and extortionate"*, and that Petitioner be suspended from the practice of law for a period of six (6) months. The Board further directed Petitioner to make restitution of the fee to his former client. (A-11)

The Supreme Court of Florida, sitting as a Court of original jurisdiction reviewed the Judgment of the Board of Governors and findings of the referee and approved the recommended six (6) month suspension, but ruled that restitution of the Petitioner's attorney's fee was not proper because "reasonableness" of the fee was not properly the subject of a grievance action. (A-1)

Petitioner's alleged misconduct under Count Two was based upon his representation of a Mrs. Evelyn Geise in a divorce action arising in Pinellas County, Florida. In 1961, Petitioner and Mrs. Geise negotiated a contingent fee contract for his representation, providing for the recovery of "50% of the total value of property obtained, protected or recovered—including the value of any estate by the entireties, alimony or dower rights." During the divorce proceedings, Mr. Geise died, leaving jointly held property valued at $8,000.00. Mrs. Geise then executed a note and mortgage in settlement of Petitioner's fee in the amount of $2,000.00. This sum was computed to be fifty percent (50%) of deceased husband's interest in the jointly held property (50% of $4,000.00).

Mrs. Geise subsequently complained about the fee and told Petitioner if he would not reduce it to $1,000.00, she would take the matter to the Grievance Committee.

Mrs. Geise caused a grievance to be filed and the disciplinary proceedings herein involved followed, resulting in Petitioner's suspension.

## STAGE OF PROCEEDINGS WHEREIN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

Petitioner was compelled to be a witness against himself as reflected by the record below.

VOLUME II, PAGE 2, TRANSCRIPT OF TESTIMONY.

"Mr. Sundberg: The Florida Bar will next call the respondent, N. Alfred Winn, under provisions of Rule 11.06(7), of the Integration Rule and Adverse Witness Rule.

Mr. Meros: To which the respondent objects and which has previously been argued to the Referee and ruled upon. I don't believe the objection has been made a matter of record.

The Referee: The Referee will overrule the objection and will rule that the Florida Bar may call the responded pursuant to the ruling, indicated rule by the Florida Bar, and that the Referee rules that the respondent may be treated as an adverse witness as provided for in the Florida Rules of Civil Procedure.

N. Alfred Winn, the respondent herein, called as a witness by the complainant, and having been duly sworn, testified as follows: . . ."

## ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT OF CERTIORARI

### PETITIONER, N. ALFRED WINN, WAS COMPELLED TO TESTIFY AGAINST HIMSELF BEFORE A REFEREE OF THE FLORIDA BAR IN A DISCIPLINARY PROCEEDING CONTRARY TO THE FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Petitioner, N. Alfred Winn, was called as an adverse witness by counsel for the Florida Bar under the provisions of Rule 11.06(7), Integration Rule of the Florida Bar and pursuant to the Florida Rules of Civil Procedure and compelled to testify over objection of his counsel, contrary to his right not to be compelled to be a witness against himself.

Petitioner respectfully submits that Writ of Certiorari should issue for the reason that compelling Petitioner to be called as a witness against himself pursuant to Integration Rule 11.06(7), Florida Bar and Rule 1.450, Florida Rules of Civil Procedure is patently in violation of his rights under Amendments V and XIV, United States Constitution. The Judgment of the Florida Supreme Court is not in accord with applicable decisions of this Honorable Supreme Court. *Spevack v. Klein*, 385 U.S. 511, 17 L. ed. 2nd 574, 87 S. Ct. 625 (1967).

Petitioner's suspension from the practice of law for a period of six (6) months for disciplinary reasons involving illegal and extortionate fees is a penalty within the meaning of the Fifth Amendment, United States Constitution. *Griffin v. California*, 380 U.S. 609, 14 L. ed. 2nd 106, 85 S. Ct. 1229 (1965).

Over his counsel's objection, Petitioner was called under Integration Rule 11.06(7) and the Rule 1.450, Florida Rules of Civil Procedure (Adverse Witness Rule). Rule 11.06(7) subjects a respondent in a disciplinary proceedings to contempt of court for failure to answer questions.

Thus the Referee, Board of Governors and Florida Supreme Court seem to consider a disciplinary proceeding civil in nature and that Petitioner is not entitled to basic constitutional protections. Considering that a disciplinary proceeding is penal in nature, it necessarily follows that a person subjected to suspension or disbarment from his profession is entitled to Fifth Amendment protections.

In *U. S. v. White,* 322 U. S. 694, 698, 88 L. ed. 1542, 1546, 64 S. Ct. 1248 (1944) it was stated:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . ."

In the instant case the procedure utilized went beyond all ordinary and reasonable bounds of propriety as to constitutional safeguards when the *Prosecutor* (Attorney for the Florida Bar), called the *Defendant,* (Petitioner, Winn) to testify as an adverse witness before the *Trial Judge* (Referee) in the disciplinary proceeding. The Referee compounded the error by compelling Petitioner to testify as an Adverse Witness subject to leading questions as though the parties were involved in civil litigation.

This Honorable Supreme Court decided the very issue raised in this Petition in *Spevack v. Klein,* 385 U.S. 511, 17 L. ed., 2nd 574, 87 S. Ct. 625 (1967). In *Spevack v. Klein,* supra, it was held:

> ". . . that the self-incrimination clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and deprivation of a livelihood as a price for asserting it." 385 U.S. at page 577.

While the attorney in the *Spevack* case was disbarred for refusal to testify and did not produce certain records under subpoena, the instant case goes further in that Petitioner was actually *compelled* to testify as a so-called "Adverse Witness".

The Integration Rule of the Florida Bar is little different than the "rack" or "thumbscrew" to force testimony from the lips of an accused. Its pressures are subtle, but none the less painful. The rule places an accused in the position of confessing his sins or suffering the pain of contempt.

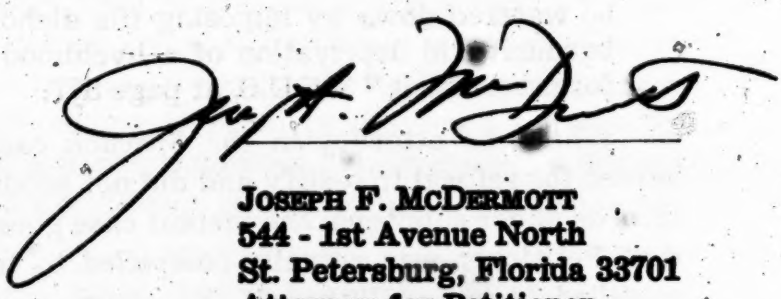
The principles in the case at bar and the *Spevack* case remain the same:

> ". . . nor shall be compelled in any criminal case to be a witness against himself."
> Amendment V, Constitution of the United States.

## CONCLUSION

Petitioner respectfully prays this Honorable Supreme Court grant Writ of Certiorari for the foregoing reasons.

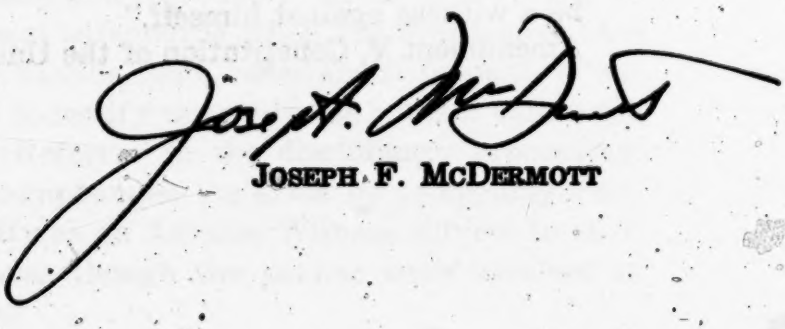
Respectfully submitted,



JOSEPH F. MCDERMOTT
544 - 1st Avenue North
St. Petersburg, Florida 33701
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I certify that this Petition for Writ of Certiorari was served upon opposing counsel by mailing copies thereof to The Honorable Alan Sundberg, Legal Building, St. Petersburg, Florida and to The Honorable Marshall Cassedy, Executive Director, The Florida Bar, Tallahassee, Florida.



JOSEPH F. MCDERMOTT

# APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION AND,
IF FILED, DETERMINED.

## IN THE SUPREME COURT OF FLORIDA

## JANUARY TERM, A.D. 1968

| | | |
|---|---|---|
| THE FLORIDA BAR, | ) | |
| | ) | |
| *Complainant,* | ) | |
| | ) | |
| vs. | ) | CASE NO. 36,450 |
| | ) | |
| N. ALFRED WINN, | ) | |
| | ) | |
| *Respondent.* | ) | |

Opinion filed March 20, 1968.

Case of original jurisdiction — Complaint from The Florida Bar.

Alan C. Sundberg, for The Florida Bar, Complainant.

George N. Meros of Meros & Wilkinson, for Respondent.

DREW, J.

This case is before the Court for review of the judgment entered by the Board of Governors of The Florida Bar on June 7, 1967, the pertinent portions of which are as follows:

> "The Complaint against respondent was set forth in two separate counts. Count I dealt with his representation of a Mrs. Hickman in connection with divorce proceedings, incompetency proceedings, minor criminal charges and a personal injury case. The evidence is disputed concerning the propriety of the fees charged this client. The

evidence is undisputed that the respondent continued his representation of this client without advising the courts of her adjudication of incompetence. The Complaint alleged that respondent charged his client an exorbitant or extortionate fee in the amount of $3500 for representing her in a divorce proceeding. During that time the client was living with her parents and her earnings were $14.26 per week as a beautician trainee. Respondent undertook extensive litigation on behalf of the client which was alleged to be unproductive and ill-considered.

"Count II charges the respondent with extracting an extortionate fee from his client, Evelyn Giese. It was alleged that the respondent entered into a written contingent fee contract providing for the payment of a 50% contingent fee to be computed upon the full value of any property which he would be instrumental in recovering from her husband. Although preliminary work was done in the defense of this divorce case, the plaintiff-husband died before the case came to trial. The parties homestead of the net value of $8000 passed to Mrs. Giese by right of survivorship. Respondent then billed his client for $2000 representing 50% of the value of the husband's estate which she received upon his death. Payment of said $2000 fee was secured by a note and mortgage upon the property which was executed by the client and delivered to the respondent.

"After trial on the merits, the referee recommended that respondent be found not guilty upon Count I because his conduct therein did not clearly violate the canons of ethics. With respect to Count II, the referee recommended that the respondent be found guilty, that he pay costs and be placed upon probation for an appropriate period of time.

"After consideration, the Board of Governors concurred in the finding of not guilty upon Count I of the Complaint. It concurred in the referee's

finding of guilt upon Count II. It further found that said contingent fee contract was illegal and extortionate. The Board directed that respondent be suspended from the practice of law for six months and thereafter until he shall make restitution to his client, Giese, of $2,000 and until he shall pay the costs of these proceedings in the amount of $1,245.22."

We have heard oral argument and have reviewed the record in this proceeding. Our examination of the record in this cause reveals that the Board of Governors of The Florida Bar was in error in its finding that the referee exonerated the respondent from guilt as to Count I of the complaint. No such finding appears from the record in this cause.

We are, nevertheless, generally in accord with the Board's judgment but are of the view that the recommendation that the respondent be required to make restitution of an attorney's fee of $2,000 is unauthorized. An exorbitant or extortionary attorney's fee is properly the subject of inquiry in a disciplinary proceeding and, if established, will support an appropriate disciplinary order. The rule (11.02[4], Article XI, Integration Rule, Florida Bar) provides "controversies as to the amount of the fees are not grounds for disciplinary proceedings unless the amount demanded is extortionate or the demand is fraudulent." This rule contemplates that a member of The Bar may be properly disciplined for such condemned conduct. Disciplinary proceedings are essentially a function of the Court instituted in the public interest and designed to preserve the purity of The Bar. No private rights except those of the accused attorney are involved. Application of Harper, 84 So. 2d 700. "A judgment in such proceedings does not affect the rights of any injured person to maintain a civil action against the attorney nor prevent the public authorities from the institution of criminal proceedings if justified by the nature of the charges." Application of Harper, supra. Again, in Application of Harper, supra, this Court quoted with approval the following statement from In Re Keenan, 287 Mass. 577, 192 N.E. 65, 68, 96 A.L.R. 679, text 682, 683.

"It [disciplinary proceedings] does not afford redress for a private grievance. It is an act undertaken and carried forward solely for the public welfare." This does not mean that where monies entrusted to an attorney are converted to his own use, the repayment of such sums may not be made a condition of reinstatement. The rule (11.02[4], Article XI, Integration Rule) specifically provides the circumstances and conditions under which the conversion of funds may be the subject of a requirement for repayment. Controversies, however, concerning the reasonableness of fees charged to and paid by clients are matters which by the very nature of the controversy should be left to the civil courts in proper proceedings for determination. What may be a reasonable fee in one area of the State may be unreasonable in another and this Court can take judicial knowledge of the fact that the opinions of reputable lawyers concerning what constitutes a reasonable fee in any given situation often are as far apart as the poles. Accordingly,

IT IS ORDERED that the respondent be suspended from the practice of law for a period of six months from the effective date of this judgment. The Florida Bar shall have and recover from respondent the costs of these proceedings in the amount of $1,245.22, for which let execution issue.

It is so ordered.

CALDWELL, C.J., THORNAL and ADAMS, J.J., concur

ERVIN, J., dissents with Opinion

ERVIN, J., dissenting:

I do not agree with the Board of Governors and the apparent concurrence of the majority of the Court that Respondent is not guilty of the complaint in Count I, or at least to a part of the charge therein. It appears from the record with respect to Count I that Respondent represented a Mrs. Hickman in several matters and that he received from her $3,748.28 in fees; that most of these fees came not directly by payments from Mrs.

Hickman but from funds received by Respondent on behalf of Mrs. Hickman, viz., proceeds of the sale of a lot owned by her, from the settlement of an accident case, and from the settlement of a $4,000 mortgage upon the residence of the Hickmans, which mortgage was given to her by Mr. Hickman as a result of a partition suit brought by him subsequent to their divorce. Respondent claimed the right to pay over to himself considerable of these funds pursuant to an assignment he had Mrs. Hickman execute on August 24, 1962, which assigned to him all of her title and interest in the proceeds of the partition suit "as security for the payment of all legal fees, costs, expenses and disbursements now owed or incurred in the future . . ." It appears that Mrs. Hickman was adjudged incompetent on November 4, 1963 and committed to the G. Pierce Wood Mental Hospital in Arcadia, Florida, on November 19, 1963. Her sanity was restored on June 25, 1964. Respondent handled Mrs. Hickman's restoration of sanity proceedings in the county judge's court at the time the circuit court in the foreclosure of the $4,000 mortgage had appointed a guardian ad litem to review an accounting of Respondent of Mrs. Hickman's funds. It appears Mrs. Hickman was represented by Respondent in the legal matters referred to before, during, and after her period of incompetency. At all times the Respondent dealt with Mrs. Hickman as if she were sui juris and fixed and collected his said fees from her funds absent any approval by a duly appointed legal guardian or by the circuit judge or county judge. In this connection the referee made a recommendation of guilt as to Count I as follows:

> "While the 'Assignment' executed by respondent's client [Mrs. Hickman] does not violate any rule of substantive law known to your Referee, it would appear that in the instant case it should be treated as void as in violation of Rule 11.02(4) of the Integration Rule of the State of Florida for the reason that the 'Assignment' obviates the obvious intention of the aforementioned rule. . . .
> ". . . The Referee does, however, find that the re-

spondent knew or should have known of the incompetency of his client during the period of time alleged in the Complaint and that his failure to disclose the same to the Court in litigation then pending, as well as the withdrawal of funds from the registry of the Court on behalf of his client without filing a suggestion of incompetency amounts to a violation of Rule 3 of the Additional Rules Governing the Conduct of Attorneys in Florida, and the respondent, is, therefore, found guilty of such violation."

I agree with the referee the Respondent is guilty of Count I to the extent found by the referee and quoted just above.

Count II of the complaint involved the attorney-client relationship between Respondent and Mrs. Evelyn Giese. Respondent entered into a contingent fee contract with Mrs. Giese providing for the payment to him of a contingent fee of 50 per cent to be computed upon the full value of any property which he was instrumental in recovering from Mrs. Giese's husband. The contract stipulated that if divorce proceedings or, more accurately, if counter-divorce proceedings (Mr. Giese had filed divorce proceedings against his wife) became necessary on behalf of Mrs. Giese in connection with recovering any of said property, Respondent would file the same. Respondent did some preliminary work in defense of Mrs. Giese in the husband's divorce proceedings. However, it does not appear Respondent was required to do more than this preliminary work under the attorney-client contingent fee contract, because Mr. Giese died before his divorce proceedings came on for trial. The parties' homestead of the net value of $8,000 passed to Mrs. Giese by right of survivorship. The homestead was held by them as an estate by the entireties. Respondent then billed his client for $2000, representing 50 per cent of the value of the husband's interest in the homestead which she received upon his death. Payment of the $2000 fee was secured by a note and mortgage upon the property which was executed by Mrs. Giese and delivered to the Respondent.

My disagreement with the majority opinion is that I believe that under these particular circumstances an exorbitant fee was charged by Respondent pursuant to the contingent fee contract for "recovery" of property from the deceased husband's estate. To my mind, the Respondent was not instrumental in "recovering" any property by his legal efforts, but the property of her husband which Mrs. Giese received came to her solely due to adventitious circumstance — at least from Mrs. Giese's "recovery" standpoint — of the husband's death, and by operation of the law of survivorship.

Furthermore, the Board of Governors found the contingent fee contract was contrary to public policy insofar as it provided for the possibility of Respondent handling divorce proceedings for Mrs. Giese as a necessary predicate to recovering property from her husband. See 3 Fla. Jur., Attorneys at Law, §54, *Contracts for Contingent Fees,* page 389; also 30 A.L.R. 188.

I think that under the foregoing circumstances the fee charged and secured by the note and mortgage was at least prima facie exorbitant and the Board of Governors was correct in ordering the $2000 refunded (see Rules 12 and 13 of the Canons of Professional Ethics Governing Attorneys) subject, however, to this reservation: that if the Respondent elects within a reasonable time to bring an appropriate action against Mrs. Giese in a court of competent jurisdiction to determine whether he is entitled to the $2000 or any part thereof as the value of any legal services he rendered Mrs. Giese, he should not be required to refund the amount found by the court to be due him. It is assumed that Respondent is still in position to have this question determined if he is so advised, since from the record it appears he holds the note and mortgage Mrs. Giese executed securing the $2000 fee.

With respect to the disciplinary action to be meted the Respondent because of the violations indicated above, I disagree with the Board of Governors and agree with the recommendation of the referee, except as hereinafter noted.

The referee recommended as follows:

> "The Referee is of the opinion that the conduct of the respondent, which is the subject matter of these proceedings, was the result of a lack of appreciation by respondent of the effects of his conduct rather than intentional acts involving moral turpitude. The Referee, therefore, believes and recommends that the respondent should be reprimanded, charged with the costs of this proceeding, and placed on probation for an appropriate period of time sufficient to evidence his departure from the practice which gave rise to this Complaint."

I agree that the Respondent was not proven guilty of moral turpitude, but was grossly and blindly obtuse to applicable rules of professional ethics and public policy in his conduct concerning his clients in the particulars noted. He considered he had full liberty under his contractual arrangements for fees with them, to pay over one client's funds to himself as fees, notwithstanding her incompetency, and he construed his contract with the other client (Mrs. Giese) to entitle him to his fee because the result that eventuated, i.e., the passing of said property to Mrs. Giese on the death of her husband by the law of survivorship, was the equivalent of Respondent obtaining it by his legal efforts.

I think the discipline commensurate with the foregoing circumstances would be a reprimand of him for his unprofessional conduct; that he be placed on probation for a period of one year; that he refund the $2000 fee to Mrs. Giese, or disclaim his right to receive it if he has not yet collected it, provided that he may if he deems it appropriate have determined, by filing a suit at an early date in a court of competent jurisdiction, whether he is entitled to retain any part of the fee for the preliminary defense work he did in her husband's divorce proceeding against Mrs. Giese; that he be required to pay the costs of these proceedings in the amount of $1,245.22 and in default of any of such requirements that the Respondent be subjected to further discipline.

I have dissented in this case because I believe the Respondent's action in taking funds belonging to his client while she was declared an incompetent and in taking a fee under a contingent fee contract when his legal efforts were not instrumental in recovering property from his client's husband, are instances of professional misconduct of first impression in our jurisdiction which should be clearly noted and discussed. The main point of cleavage I have with the majority opinion is that it holds the $2000 does not have to be refunded as an exorbitant fee in any event. It appears to me that the Board of Governors of the Florida Bar and this Court have a duty in disciplinary cases to determine whether an attorney has exacted an extortionate or exorbitant fee under flagrant and extreme circumstances of professional misconduct and, as a part of the disclipline meted, provide for refund of the fee; and the attorney should either refund the fee as a condition precedent to the lifting of the suspension or disbarment, or in the alternative expeditiously obtain an adjudication from a court of competent jurisdiction in a proper case that he is entitled to the fee or a part thereof.

# IN THE SUPREME COURT OF FLORIDA

## JANUARY TERM, A.D. 1968

## TUESDAY, APRIL 30, A.D. 1968

| | | |
|---|---|---|
| THE STATE OF FLORIDA EX REL THE FLORIDA BAR, | ) | |
| *Complainant,* | ) | |
| vs. | ) | CASE NO. 36,450 |
| N. ALFRED WINN, | ) | |
| *Respondent.* | ) | |

On consideration of the Petition for Rehearing filed by Attorney for Respondent,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

SID J. WHITE

CLERK SUPREME COURT

## IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR )
)
*Complainant,* )
)
v. )
)
N. ALFRED WINN )
)
*Respondent.* )

## JUDGMENT

This cause came on for review by the Board of Governors of The Florida Bar upon the report of its referee and the record of proceedings before him.

The Complaint against respondent was set forth in two separate counts. Count I dealt with his representation of a Mrs. Hickman in connection with divorce proceedings, incompetency proceedings, minor criminal charges and a personal injury case. The evidence is disputed concerning the propriety of the fees charged this client. The evidence is undisputed that the respondent continued his representation of this client without advising the courts of her adjudication of incompetence. The Complaint alleged that respondent charged his client an exorbitant or extortionate fee in the amount of $3500 for representing her in a divorce proceeding. During that time the client was living with her parents and her earnings were $14.26 per week as a beautician trainee. Respondent undertook extensive litigation on behalf of the client which was alleged to be unproductive and ill-considered.

Count II charges the respondent with extracting an extortionate fee from his client, Evelyn Giese. It was alleged that the respondent entered into a written contingent fee contract providing for the payment of a 50% contingent fee to be computed upon the full value of any property which he would be instrumental in recovering from her husband. Although preliminary work was done in the defense of this divorce case, the

plaintiff-husband died before the case came to trial. The parties homestead of the net value of $8000 passed to Mrs. Giese by right of survivorship. Respondent then billed his client for $2000 representing 50% of the value of the husband's estate which she received upon his death. Payment of said $2000 fee was secured by a note and mortgage upon the property which was executed by the client and delivered to the respondent.

After trial on the merits, the referee recommended that respondent be found not guilty upon Count I because his conduct therein did not clearly violate the canons of ethics. With respect to Count II, the referee recommended that the respondent be found guilty, that he pay costs and be placed upon probation for an appropriate period of time.

After consideration, the Board of Governors concurred in the finding of not guilty upon Count I of the Complaint. It concurred in the referee's finding of guilt upon Count II. It further found that said contingent fee contract was illegal and extortionate. The Board directed that respondent be suspended from the practice of law for six months and thereafter until he shall make restitution to his client, Giese, of $2,000 and until he shall pay the costs of these proceedings in the amount of $1,245.22.

DONE and ORDERED this 7th day of June, 1967.

THE BOARD OF GOVERNORS OF THE FLORIDA BAR

By: /s/ FLETCHER G. RUSH

Fletcher G. Rush, as President
The Florida Bar

I, Marshall R. Cassedy, Executive Director of The Florida Bar, do hereby certify that the attached and foregoing two pages constitute a true and correct copy of the judgment filed in the office of The Florida Bar, in the disciplinary proceeding entitled The Florida Bar, complainant, v. N. Alfred Winn, respondent, all as the same appear among the records and files in my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of The Florida Bar at Tallahassee, Florida on this 8th day of June, 1967.

/s/ Marshall R. Cassedy

(Seal)

# IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| THE FLORIDA BAR, | ) | |
| | ) | CONFIDENTIAL |
| *Complainant,* | ) | |
| | ) | Case No. 6A64-7 |
| vs. | ) | Case No. 6A65-7 |
| | ) | |
| N. ALFRED WINN, | ) | REPORT OF REFEREE |
| | ) | |
| *Respondent.* | ) | |

Pursuant to the undersigned being duly appointed herein as Referee to conduct these proceedings according to Article XI of the Integration Rule of The Florida Bar, final hearing was held in this matter on September 14, 1966, and September 15, 1966, and continued to November 8, 1966, upon which latter date the same was concluded. All pleadings, motions and exhibits filed before me together with the transcript of these proceedings are presented herewith.

## SUMMARY OF THE PROCEEDINGS

The Complaint against respondent is in two counts. *Count I* charges the respondent with exacting from a client a grossly excessive, exhorbitant and extortionate attorney's fee in connection with a litigated matter; the purchase by respondent of an interest in the subject matter of the said litigation; maintenance of litigation and the filing of other suits and appellate proceedings without the knowledge, consent or approval of respondent's client; and failure of respondent to advise the Court in a litigated matter of the adjudication of incompetency of respondent's client; and failure of respondent to account to his client or her guardian ad litem for funds received by respondent on behalf of his client in the course of the representation.

*Count II* charges respondent with assuming the representation of a client in a divorce proceeding upon a conditional fee contract and the extortionate collection of such fee.

The respondent chose not to answer the Complaint which, pursuant to the rules, was accepted as a general denial and the matter proceeded to final hearing before the undersigned on September 14 and 15, 1966, and November 8, 1966. The Bar was represented by Alan C. Sundberg, Esq., of St. Petersburg, Florida, and the respondent was represented by George N. Meros, Esq. of St. Petersburg, Florida.

## SUMMARY OF THE EVIDENCE

### COUNT I

On November 22, 1960, Ruth S. Hickman, through her then attorney, Joseph W. Bradham, Jr., brought suit against her husband, James C. Hickman, seeking a divorce. In April of 1961, Mr. Bradham withdrew as counsel for Mrs. Hickman, and the respondent was substituted as attorney of record. Thereafter, the divorce case was occasioned by various continuances requested by respondent because of the emotional instability of his client, Mrs. Hickman, and her inability to personally assist in the prosecution of this case.

In September of 1961, James C. Hickman, the husband of Ruth S. Hickman, filed an Inquisition of Incompetency with the County Judge's Court of Pinellas County, Florida. Ruth S. Hickman was represented in this proceeding by respondent, which resulted in an order of the County Judge's Court adjudging no incompetency, dated September 18, 1961.

A final decree was entered in the divorce action on December 7, 1961, which decree made no provision specifically as to the disposition of the marital home of the parties to said proceedings.

On December 7, 1961, James C. Hickman filed a suit against Ruth S. Hickman seeking a partition of the former marital domicile of the parties. Respondent filed a Motion to Dismiss this Complaint which was denied and he thereupon filed an Interlocutory Appeal from this order without superseding the proceedings below.

This appeal was dismissed as frivolous on April 12, 1962, by the District Court of Appeal for the Second District of Florida.

Meanwhile the residence which was the subject matter of the partition suit had been sold, pursuant to order of the Circuit Court, to the plaintiff for the sum of $12,000.00; $3,200.00 of which was paid into the registry of the Court which included $1,200.00 costs and expenses, $2,000.00 on account of the purchase price and the balance by a mortgage for $4,000.00, payable to Ruth S. Hickman, executed on March 28, 1962, by James C. Hickman, which was delivered to respondent in late March or early April, 1962, but not recorded.

An appeal was filed by respondent from the order approving sale in this cause on April 6, 1962. The District Court of Appeal for the Second District subsequently affirmed the order of sale.

In October of 1963, an Inquisition of Incompetency with respect to Ruth S. Hickman was filed with the County Judge's Court of Pinellas County, Florida, by the Mental Health team of the Pinellas County Health Department. Respondent was served with a Notice of Hearing on said Inquisition which was conducted before the County Judge of Pinellas County on November 4, 1963. Respondent admits receiving this Notice of Hearing prior to the hearing date, but did not appear.

Ruth S. Hickman was adjudicated incompetent by the County Judge of Pinellas County, Florida, on November 4, 1963. She was, thereafter, admitted to the G. Pierce Wood Hospital in Arcadia, Florida, on November 19, 1963, where she remained until March 23, 1964. She received two passes while a patient at this institution. One pass from February 14 through 17th, 1964, and a second from March 7th to 10th, 1964.

The County Judge's Court of Pinellas County, Florida, entered an order of restoration of sanity with respect to Ruth S. Hickman on June 25, 1964, in proceedings instituted by respondent.

The respondent apparently lost or misplaced the $4,000.00 note and mortgage given to Ruth S. Hickman in connection with the partition proceeding and on the 31st day of July, 1963, brought a suit in the Circuit Court of the Sixth Judicial Circuit of the State of Florida to establish the note and mortgage as lost instruments and to foreclose the same. In connection with this action, respondent, as attorney for Ruth S. Hickman, filed a Notice of Lis Pendens. The defendants in the foreclosure suit filed a motion to substitute other security for the mortgaged premises and to relieve the mortgaged premises from the lis pendens filed in the cause. Notice of a hearing on this motion was served upon respondent on November 29, 1963, and a hearing thereon was conducted before the Honorable Thomas Collins, Judge of the Circuit Court of the Sixth Judicial Circuit of the State of Florida, on December 3, 1963.

Judge Collins and the witnesses, Eli S. Jenkins and C. J. Abernathy, attorneys for the defendants in the foreclosure suit testified that respondent made no statement to the Court with respect to the mental capacity of Ruth S. Hickman at this hearing.

The witnesses, Eli S. Jenkins and C. J. Abernathy, testified at the hearing of December 3, 1963, the respondent represented to the Court that he had discussed the motion with respect to the substitution of other collateral for the lis pendens in this cause with his client; and that his client had objected to the proceedings and instructed him to resist the motion, but if the Court saw fit to grant the same, require a minimum amount for deposit with the Court in lieu of the lis pendens in excess of $4,000.00. Neither witness testified that respondent stated when he discussed this matter with his client, but Eli S. Jenkins stated that respondent's comments indicated that he had discussed the subject matter of the motion with his client after respondent's comments indicated that he had discussed service of the motion was made upon him on November 29, 1963. The respondent denied that he had made a statement at the hearing on December 3, 1964, to the effect that he had discussed the subject matter thereof with his client.

Respondent further admitted that he made no investigation into the competency of Ruth S. Hickman and stated that at the time he considered it to be a matter of small importance as he felt that he had general authority to represent his client. Respondent further states that he did not check the incompetency file in the County Judge's Court of Pinellas County, Florida, until just prior to the Petition for Restoration which he filed on behalf of Ruth S. Hickman in June of 1964.

Respondent testified that Ruth S. Hickman visited him in his office in St. Petersburg during the two passes which she obtained from the State Hospital in Arcadia, but cannot recall the exact time or place or what was discussed beyond general expressions that the pending litigation was considered.

During the course of representation of Ruth S. Hickman, the respondent represented her upon two occasions in Municipal Court on charges of driving while intoxicated and on one occasion in a proceeding before a Justice of the Peace on bad check charges.

Subsequent to a hearing on December 3, 1963, defendants in the foreclosure suit filed a suggestion of the plaintiff's incompetency and the Circuit Court appointed Harold Brower as Guardian ad Litem for Mrs. Hickman. The Guardian ad Litem thereafter requested respondent to give him an accounting as to monies received and disbursed for the account of Ruth S. Hickman and set a deadline for the same on July 21, 1964. Respondent testified that he did not furnish this accounting to the Guardian ad Litem as prior to the due date thereof Ruth S. Hickman's competency was restored, viz, June 25, 1964, and that he accounted directly to his client Ruth S. Hickman.

Upon respondent's assuming representation of Ruth S. Hickman, he collected a retainer fee of $1,005.00, collected and retained proceeds due his client from the sale of a lot, and proceeds due his client from a settlement of an accident case and various other minor amounts, which

total as of May 23, 1962, $4,629.19. He disbursed monies for his client's account including the payment of her personal bills and a $35.00 "weekly maintenance" allowance, all of which as of May 23, 1962, totaled $3,171.21. On the same day, respondent charged a fee for his services in the divorce proceeding of $3,500.00, which left a balance due him from his client as of that date of $2,242.02.

On August 24, 1962, respondent prepared and procured the signature of Ruth S. Hickman to a document entitled "Assignment" wherein Ruth S. Hickman assigned to respondent ". . . all her right, title and interest in and to the funds, monies, proceeds and benefits accrued or accruing in the future to her in that certain legal action styled James C. Hickman, Plaintiff, v. Ruth S. Hickman, Defendant, pending in Pinellas County, Florida, as Chancery No. 61,453, as security for the payment of all legal fees, costs, expenses and disbursements now owed or incurred in the future . . ." This instrument further authorized the respondent to deduct from any such funds collected under the assignment all sums due him and remit the balance, if any, to his client, her heirs or assigns.

Acting upon the authority of this assignment, respondent subsequently received additional funds due his client from not only the divorce action mentioned in the assignment, but the partition suit and the subsequent note and mortgage foreclosure proceeding.

The receipts and disbursements of respondent's retainer fees and other sums collected for his client are itemized in an accounting offered by the respondent and received into evidence as Respondent's Exhibit No. 6. This accounting shows an excess of receipts over disbursements in the amount of $3,748.28 which respondent has taken on account of attorney's fees in the divorce proceeding, representation of his client, two driving while under the influence charges, bad check charges and for the restoration of her sanity. Respondent testified that he has accepted this sum as payment in full for all

legal services rendered to Ruth S. Hickman during her lifetime, including services in the partition and foreclosure suit with the exception of such fees as he might be entitled to receive from the mortgagor in the foreclosure proceeding.

The following statements rendered by respondent to his client, Ruth S. Hickman, were introduced into evidence:

1. Statement of October 7, 1961, pertaining to the proceeds from the sale of certain realty, Complainant's Exhibit No. 18.
2. Statement of May 23, 1962, pertaining to the divorce action, Complainant's Exhibit No. 20.

Following the death of Ruth S. Hickman on November 5, 1965, respondent filed her Last Will and Testament and was appointed Executor by the County Judge's Court of Pinellas County, Florida. The administration of this estate is now pending in said Court.

## COUNT II

In 1962, Mrs. Evelyn Giese sought advice from respondent concerning her rights in and the advisability of a proposed transfer of her interest in the marital domicile to her husband. Subsequently, when Mrs. Giese's husband brought suit for divorce, she contacted respondent and engaged him to represent her in the pending action. Respondent, pursuant to a written agreement dated October 2, 1962 (Complainant's Exhibit 2), agreed to represent Mrs. Giese for a retainer fee of $200.00 plus 50% of the total value of all property obtained, protected or recovered by a defense of the divorce action, or a counterclaim for divorce, including the value of any estate by entireties, alimony or dower rights.

Thereafter, respondent filed an answer and counterclaim, took the deposition of the plaintiff, propounded written interrogatories and made an investigation into

the facts surrounding plaintiff's grounds for divorce; but no prosecution towards a final decree was taken in this proceeding until the death of the plaintiff in October of 1963.

Following her husband's death, Mrs. Giese contacted respondent and sought his assistance in obtaining certain papers and documents concerning jointly-owned property which were then in the possession of the attorney who was handling Mr. Giese's estate.

Respondent maintained that under the contingent fee contract, he was entitled to $2,000.00, representing 50% of the value of the husband's half interest in the marital home, which passed to Mrs. Giese as surviving tenant by the entirety.

Respondent prepared a note for $2,000.00 secured by a mortgage on the marital domicile, and at an appointment on January 28, 1964, insisted that Mrs. Giese execute these documents as security for respondent's attorney fee. Mrs. Giese testified that respondent told her that unless she signed the note and mortgage, he would put a lien on her house. Respondent denies this threat, but admits that the conference was late in the day, that he became agitated with Mrs. Giese and advised her that something had to be done that day to settle the matter.

Thereafter, Mrs. Giese contacted respondent and requested a reduction in the amount of the attorney's fees and stated that if she could not work things out with respondent on this basis, she would have to go to the Grievance Committee about the matter. Respondent refused to reduce the amount of his attorney fees, the note was subsequently paid, the mortgage satisfied, and Mrs. Giese complained of respondent's conduct to the local Grievance Committee.

## PERSONAL HISTORY

Respondent is 42 years of age, a graduate of the University of North Carolina, and received his LL.B. Degree from the University of Florida, College of Law in September of 1952. After graduation, respondent worked other than as an attorney; and commenced the practice of law in St. Petersburg, Florida in March of 1953. Respondent is married and has five children. No evidence was introduced as to respondent's personal and professional reputation in the community, nor was any evidence of prior disciplinary action against respondent offered.

## FINDINGS

### COUNT I

1. In April of 1961, respondent commenced representation of Ruth S. Hickman, the defendant in a divorce action then pending in Pinellas County, Florida.

2. During the course of this representation, respondent had, by May 23, 1962, collected the sum of $4,629.19 from or on behalf of his client, and had made expenditures, including a $35.00 weekly maintenance allowance to Ruth S. Hickman, totaling $3,171.21.

As of this date, respondent had charged his client attorney's fees in the amount of $3,500.00, which left a balance due respondent according to his statement of $328.79.

3. On August 24, 1962, respondent prepared and secured his client's signature to an agreement whereby Ruth S. Hickman assigned to respondent as security for legal fees and costs all of her right, title and interest in and to the funds, monies, proceeds and profits accrued or accruing in the future to her in the divorce proceedings.

4. Thereafter respondent received other funds on behalf of Ruth S. Hickman and deposited the same to his trust account crediting the account of Ruth S. Hickman.

5. There is no evidence that the "Assignment" was procured by the exercise of undue influence, undue persuasion or by trick or artifice; and therefore, the Referee is of the opinion that there is no grounds for holding the same extortionate or fraudulently collected.

6. Ruth S. Hickman died prior to the institution of these proceedings and therefore did not testify.

7. The respondent knew or should have known that Ruth S. Hickman was adjudicated an incompetent by the County Judge's Court of Pinellas County, Florida, on November 4, 1963, and remained so incapacitated until an order of restoration was entered by the same Court on June 25, 1964. No guardian was appointed.

8. That during the period of time that Ruth S. Hickman was adjudicated an incompetent, respondent represented her in the several litigated matters then pending, including the withdrawal of funds from the registry of the Court, without advising the Court of the incompetency of his client.

## RECOMMENDATION OF GUILT

There being no evidence as to a demand by the client upon respondent for an accounting, nor any evidence of any undue influence or pressure exerted by respondent on his client in the execution of the assignment, the Referee recommends that the respondent be found not guilty of a violation of Canons 11 and 12 and of Rule 11.02(4) of the Florida Integration Rule.

While the "Assignment" executed by respondent's client does not violative any rule of substantive law known to your Referee, it would appear that in the instant case it should be treated as void as in Violation of Rule 11.02(4) of the Integration Rule of the State of

Florida for the reason that the "Assignment" obviates the obvious intention of the aforementioned rule. The Referee does not, however, believe that the execution of the assignment amounted to a purchase by respondent of an interest in the subject matter of his client's litigation. Accordingly, Referee recommends a finding of not guilty as to the violation of Canon 10 as charged in the Complaint.

The evidence is insufficient to show that respondent made a false representation of fact to the Judge concerning the competency of his client as alleged in paragraph 10 of Count I of the Complaint and, therefore, recommends a finding of not guilty as to Rule 24 of the Additional Rules Governing the Conduct of Attorneys in Florida. The Referee does, however, find that the respondent knew or should have known of the incompetency of his client during the period of time alleged in the Complaint and that his failure to disclose the same to the Court in litigation then pending, as well as the withdrawal of funds from the registry of the Court on behalf of his client without filing a suggestion of incompetency amounts to a violation of Rule 3, of the Additional Rules Governing the Conduct of Attorneys in Florida, and the respondent is, therefore, found guilty of such violation.

There is no evidence to rebute respondent's testimony that his client authorized him to take all of the legal steps involved in the complicated series of litigation mentioned in Court I of the Complaint and contained in the evidence presented to this Referee. The Referee does find that, although respondent filed no new actions for his client during the period covered by his incompetency, he proceeded with the existing litigation and took affirmative steps in connection with the same, including withdrawal of funds from the registry of the Court on behalf of his client and the filing of an appeal to the District Court of the State of Florida for the Second District in the partition suit. As no guardian had been appointed for respondent's client during her in-

competency, it could be said technically that respondent proceeded with these activities without authority. The Referee does, however, feel that the respondent is not guilty of a violation of Rule 9 of the Additional Rules Governing the Conduct of Attorneys in Florida and recommends a finding of not guilty on this charge.

## FINDINGS

### COUNT II

1. On October 2, 1962, respondent undertook to represent one, Evelyn Kelly Giese in the defense of a divorce proceeding, including the filing of a counterclaim for divorce on a contingent fee contract.

2. Respondent took advantage of his position as an attorney and by his manner, conduct and actions induced his client to sign a note and mortgage on her residence in payment of a disputed fee with respondent claimed to be due him under the contingent fee contract.

## RECOMMENDATION OF GUILT

It is recommended that respondent be found guilty of violating Article XI, Rule 11.02 (2), (3) and (4) of the Integration Rules of the Florida Bar and Canons 12 and 13 of the Canons of Professional Ethics as alleged in the Complaint.

## RECOMMENDATION OF DISCIPLINE

The Referee is of the opinion that the conduct of the respondent, which is the subject matter of these proceedings, was the result of a lack of appreciation by respondent of the effects of his conduct rather than intentional acts involving moral turpitude. The Referee, therefore, believes and recommends that the respondent should be reprimanded, charged with the costs of this proceeding, and placed on probation for an appropriate period of time sufficient to evidence his departure from the practice which gave rise to this Complaint.

## STATEMENT OF THE COSTS

I find the following costs were reasonably incurred by counsel for the Bar:

| | | | |
|---|---|---|---|
| 7-17-64 | Reeves, Morey & Associates - attendance - | $ | 15.00 |
| | June 30, 1964, original and two copies - | | 35.10 |
| 2-24-65 | Lois Conley - attendance on 10-15-64 - | | 20.00 |
| | (transcript in triplicate - | | 108.00 |
| | (2 sets copies of | | |
| | (Grievance exhibits - | | 38.00 |
| | Committee) (attendance on 2-4-65 | | 10.00 |
| | (transcript in triplicate - | | 69.60 |
| | (2 sets copies of exhibits - | | 6.00 |
| 6-6-66 | Lois Conley - attendance at deposition of respondent on 4-19-66 and 5-31-66 - | | 15.00 |
| | Original transcript - | | 72.80 |
| 9-1-66 | John W. Myers - service of 7 subpoenaes - | | 24.50 |
| 9-8-66 | Lois Conley - depositions of 3 witnesses and one copy of transcripts - | | 38.80 |
| | Official Circuit Court Reporters - transcribing final hearing - | | 781.05 |
| | Telephone - long distance - | | 11.67 |
| | Total Costs - | | $1,245.52 |

It is apparent from the record before me that other costs were incurred in this matter by the grievance committee, the headquarters office of The Florida Bar and possibly the Board of Governors. It is recommended that all such costs and expenses together with the foregoing itemized amounts, be charged against the respondent.

Dated this 16th day of December, 1966.

/s/ William S. Belcher

William S. Belcher - Referee

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1968

MONDAY, MAY 20, 1968

| | | |
|---|---|---|
| THE FLORIDA BAR, | ) | |
| | ) | |
| *Complainant,* | ) | |
| | ) | |
| vs. | ) | CASE NO. 36,450 |
| | ) | |
| N. ALFRED WINN, | ) | |
| | ) | |
| *Respondent.* | ) | |

Respondent in this cause has filed petition for stay order; and upon consideration thereof, said petition is granted and the judgment of this Court is hereby stayed to and including July 1, 1968, to enable respondent to seek review in the Supreme Court of the United States and obtain any further stay from that court, and it is further

ORDERED that the motion of George N. Meros for permission to withdraw be and the same is hereby granted.

A True Copy

TEST:

/s/ Sid J. White

Sid J. White
Clerk Supreme Court.

cc: Honorable Joseph F. McDermott
Honorable Marshall R. Cassedy
Honorable Alan C. Sundbert
Honorable George N. Meros

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SEP 7 1968
JOHN F. DAVIS, CLERK

No. 338

IN THE

# United States Supreme Court

N. ALFRED WINN, PETITIONER

*v.*

THE FLORIDA BAR, RESPONDENT

On Petition for Certiorari to the
Supreme Court of Florida

## BRIEF FOR RESPONDENT

WILLIAM H. ADAMS, III
P. O. Box 4099
Jacksonville, Florida 32201

AND

ALAN C. SUNDBERG
447 Third Avenue North
St. Petersburg, Florida 33701

*Attorneys for Respondent*

September 6, 1968

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IN THE

# United States Supreme Court

No. 338

N. ALFRED WINN, PETITIONER

*v.*

THE FLORIDA BAR, RESPONDENT

## BRIEF IN OPPOSITION FOR RESPONDENT

### QUESTION PRESENTED

Was petitioner, a Florida attorney, denied the privilege against self-incrimination guaranteed by the Fourteenth Amendment when, over a general objection by his counsel which did not specify constitutional grounds, (a) he was called as a witness in a disciplinary proceeding inquiring into his professional conduct; (b) he testified at length without further objection concerning charges against him based on conduct which was not criminal under Florida or federal law, and; (c) he did not raise the question of privilege in his petition for review, his brief or the oral argument of his counsel in the Supreme Court of Florida.

### STATEMENT OF THE CASE

The statement of the case in the petition fails to describe the proceedings out of which petitioner's claim of privilege

arises. An understanding of those proceedings is necessary to evaluate petitioner's claim.

On July 27, 1967, The Florida Bar[1] filed a complaint in two counts in the Supreme Court of Florida (R-1)[2] charging petitioner with unprofessional conduct. The first count (as later amended) charged petitioner with undertaking extensive, unproductive and ill-considered litigation on behalf of a client, with charging her exorbitant fees, with failing to account to her for sums received on her behalf, and with failing to advise the court before which the proceedings in which he was representing her were pending that she had been adjudged incompetent. The second count (as later amended) charged petitioner with entering into a contingent fee contract with another client[3] by which he had agreed to represent her in a divorce case for a fee equal to half the property recovered in the proceeding, and under which he received $2,000, representing half the value of real property to which she succeeded by operation of law when her husband died while the proceedings were pending.

Neither count charged petitioner with criminal conduct.

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[1]The Florida Bar is a corporate body created by and existing under the authority of the Supreme Court of Florida. All lawyers in Florida are required to be members. The Bar has been charged by the Supreme Court of Florida with the maintenance of professional standards in the practice of law. To that end, it has been vested as an official arm of the Court with the powers and authority described in the Integration Rule of The Florida Bar. The Integration Rule is reproduced in 32 Fla. Stat. Ann., pp. 497, et seq.

[2]"R" denotes numbers in the index to the Record prepared by the Supreme Court of Florida. "T" denotes page numbers in the transcript of testimony, R-11, 12 and 13.

[3]By rule of decision in Florida, contingent fee contracts in divorce cases are against public policy and unenforcible. *Sobieski* v. *Maresco*, (Fla. App. 1962) 143 So.2d 62. But the existence of such a contract does not preclude an attorney from recovering a reasonable fee. *Salter* v. *St. Jean*, (Fla. App. 1965) 170 So.2d 94.

At the hearing before the referee,[4] Bar counsel called petitioner as a witness under Rule 11.06(7) of the Integration Rule of The Florida Bar,[5] and under the adverse witness rule in the Florida Rules of Civil Procedure.[6] Petitioner's counsel made a general objection which did not specify any constitutional grounds, state or federal (T-Vol. II, p. 2). The referee overruled the objection.[7] Petitioner then took the stand and, without further objection, testified at length concerning the facts underlying the charges (T-Vol. II, 2-137, Vol. III, 134-155, 161-165). None of the testimony which petitioner gave revealed any criminal conduct on his part.

The referee filed a report (R-4) finding that, as to count one, petitioner was guilty of unprofessional conduct in failing to disclose to the court that his client was incompetent. As to count two, the referee found petitioner

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[4]Under Article 11 of the Integration Rule, the trial of a case involving charges of professional misconduct against a lawyer is held before a referee appointed from a panel certified by the Supreme Court of Florida. The rule describes the proceedings as being neither civil nor criminal. They are "quasi judicial administrative proceedings". The referee's report is reviewed by the Board of Governors of The Florida Bar which enters a judgment. The referee may appeal from a judgment entered by the Board of Governors to the Supreme Court of Florida. See Rules 11.06 and 11.11.

[5]Rule 11.06(7) provides: "The respondent may be called as a witness by The Florida Bar to make specific and complete disclosure of all matters material to the issues. When the respondent attorney is subpoenaed to appear and give testimony or to produce books, papers or documents, and he refuses to appear or to produce such books, papers or documents, or, having been duly sworn to testify, he refuses to answer any proper question, he may be cited for contempt of this court."

[6]Rule 1.450(a), Florida Rules of Civil Procedure, is identical with Rule 43(b), Federal Rules of Civil Procedure.

[7]A transcript of the stated objection and the referee's ruling on it is reproduced in the petition for certiorari, page 8.

guilty of the misconduct charged, but in extenuation he also found that petitioner's misconduct was the result of "a lack of appreciation of the effects of his conduct."

The Board of Governors of the Bar entered a judgment (R-5) finding petitioner not guilty of the charge in count one but guilty of the charge in count two. The Board directed that petitioner be suspended from the practice of law for 6 months, "and thereafter until he shall make restitution to his client . . . of $2,000."

Petitioner applied to the Supreme Court of Florida for review of the judgment. Briefs were filed, and the case was argued orally. Petitioner has stipulated (R-14) that no claim of constitutional privilege was specifically brought to the attention of the Supreme Court of Florida, either in his petition for review, brief, or in the argument of his counsel.

The Supreme Court of Florida affirmed the judgment of the Board of Governors except that it held that the Board did not have authority to order petitioner to make restitution of the $2,000 attorney's fee (R-6). The propriety of calling petitioner as a witness was not an issue in the Supreme Court of Florida, and the court has not passed on the question.

## ARGUMENT

Nothing in the record demonstrates any reason for granting certiorari in this case since no federal question was properly raised in or decided by the Supreme Court of Florida.

**No Federal Question was Involved in the Proceedings Below**

The Fifth Amendment, which is absorbed in the Fourteenth Amendment, prevents a person from being "compelled in any *criminal* case to be a witness against himself . . .". The privilege may be claimed in any proceeding, regardless of its nature, but the danger which the privilege protects against is only the danger of criminal prosecution or conviction. The privilege does not exempt a witness from giving testimony which will subject him to civil liability or to professional discipline. It gives a witness the right not to disclose information which he may reasonably apprehend could be used in a *criminal* prosecution or which could lead to other evidence that might be so used. *Hoffman* v. *United States,* 341 U.S. 479 (1950). Cf. *Ullmann* v. *United States,* 350 U.S. 422, 431 (1955).

In *Spevak* v. *Klein,* 385 U.S. 511 (1967), this Court held that lawyers, like other individuals, are entitled to invoke the privilege against self-incrimination and that their privilege should not be watered down by "imposing the dishonor of disbarment and the deprivation of livelihood as a price for asserting it." Id. at 514. *Spevak* overruled *Cohen* v. *Hurley,* 366 U.S. 117 (1961). In both cases the lawyer involved was disbarred *because* he invoked the privilege. Neither case dealt with the scope of protection afforded by the privilege. *Spevak* held only that there is "no room in the privilege for classification of people so as to deny it to some and extend it to others." Id. at 516. In this case petitioner misinterprets *Spevak*. He reads it as holding that a lawyer may refuse to testify *at all* in any disciplinary proceeding against him. He assumes that *Spevak* treated disciplinary proceedings as if they were criminal prosecutions. Acceptance of petitioner's assumption would

violate the fundamental rule of *Spevak* by *creating* a classification under which lawyers would be exempt from giving non-incriminating testimony merely because disclosure could result in loss of professional status. This exemption is not now available to any other class of individuals.

In *Spevak* the Court assumed that if the petitioner had been compelled to testify, he would have disclosed information which could have subjected him to criminal penalty.[8] *Spevak* did not convert disciplinary proceedings against lawyers into criminal proceedings; it did not hold that disbarment is a criminal penalty; it did not hold that a lawyer charged with misconduct may not be called as a witness. It held merely that a lawyer has the same privilege against self-incrimination as anyone else, that he may exercise that privilege in a disciplinary proceeding, and that he may not be penalized for doing so.

The petition for certiorari does not suggest that petitioner's testimony was or could have been incriminating. Petitioner was charged only with professional misconduct. The charges were not based on conduct which could have been criminal. There was a danger that petitioner's testimony would result in professional discipline or civil liability, but in the context of the proceedings, there was no reasonable possibility that his testimony could be used in a criminal

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[8]The first footnote to Mr. Justice Harlan's dissenting opinion in *Spevak* points out that in that case no claim was made that "the underlying facts representing petitioner's alleged conduct were not such as to entitle him to claim the privilege against self-incrimination." The Court, therefore, dealt with *Spevak* on the premise that the lawyer had properly asserted his claim of privilege. In *Cohen* v. *Hurley*, 366 U.S. 117, 121 (1961), the Court noted that petitioner's claim of privilege was based on possible violations of sections of the New York Penal Law relating to soliciting and fee splitting. No similar provisions exist in Florida.

prosecution against him or that it could lead to other evidence that might be so used. Moreover, the testimony he actually gave when he took the stand did not disclose any criminal conduct on his part.

Petitioner had no privilege against giving testimony which could result only in civil liability or in disciplinary action against him as a lawyer. Therefore, under the circumstances, he had no constitutional privilege, and no federal question was involved in the proceedings below.

**Petitioner Did Not Assert His Claim of Privilege**

While the state may not compel the accused in a criminal case to take the stand at all, any person may be called as a witness in a civil proceeding and may be examined subject to his right not to disclose privileged matters. See *Brown* v. *United States*, 356 U.S. 148, 155 (1958). When a specific objection is made, the court must determine whether "it is evident from the implications of the question in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result." *Malloy* v. *Hogan*, 378 U.S. 1, 11 (1964), quoting from *Hoffman* v. *United States*, 341 U.S. 479, 487 (1950).

Rule 11.06(7) of the Integration Rule of The Florida Bar permits The Florida Bar to call the lawyer who is charged with misconduct as a witness. It provides that if the lawyer "refuses to appear . . . or having been duly sworn to testify, he refuses to answer any *proper* question, he may be cited for contempt (by the Supreme Court)".

The Integration Rule thus requires a respondent to appear and testify if he is called, but it provides a means of

protecting him against improper questions. If a lawyer refuses to answer any question, the issue of whether the question is "proper" must be decided, not by the referee, but by the Supreme Court. The rule thus contemplates that if a respondent lawyer refuses to answer a question, the issue of whether the question is proper can be judicially resolved. It must be assumed that if a question of privilege were brought to its attention, the Supreme Court of Florida would apply applicable constitutional principles.

While no special form of words is required for a witness to invoke the privilege, he should say enough to put the referee and the court on notice that he is claiming a constitutional right. Cf. *Quinn* v. *United States*, 349 U.S. 155 (1954). If a witness were permitted in a case like this to invoke the privilege by a general objection merely to being called as a witness, he would be insured against the success of any disciplinary action taken against him. He could, without having given The Bar or the referee any warning, proceed to testify and be confident that if he should lose his case on the merits, the judgment against him would be reversed on constitutional grounds. This would convert the privilege against self-incrimination from a shield to a sword.

When petitioner was called as a witness, his counsel made a general objection. In doing so, he did not say that petitioner was claiming any constitutional privilege. Petitioner objected merely to being called as a witness. When his objection was overruled, he took the stand and testified fully and completely. He did not take advantage of the available procedure by objecting to any question or group of questions. Under these circumstances, even if petitioner had had a constitutional privilege not to disclose particular information, he abandoned the privilege by his course of conduct.

**Petitioner Waived any Error in the Proceedings Before the Referee by Failing to bring his Claim of Privilege to the Attention of the Supreme Court of Florida.**

Under the Integration Rule of The Florida Bar, an attorney against whom a judgment is entered by the Board of Governors may petition the Supreme Court of Florida to review the proceedings.[9] Unless otherwise provided in the Integration Rule, the Florida Appellate Rules govern the proceedings.[10] Those rules provide that even errors which have been assigned by an appellant and thus brought to the court's attention are abandoned unless they are argued in the appellant's brief.[11]

Petitioner filed a petition for review in the Supreme Court of Florida. The case was briefed and argued orally, but petitioner never brought his claim of privilege to the court's attention. The court below has had no opportunity to pass on the claim which petitioner is making in this Court, and it has not done so. It was not presented to or in any way considered by the court below. Under the circumstances, the petition for certiorari does not comply with Rule 23(1)(f) of this Court, and petitioner's claim of privilege may not be asserted in this Court now as a ground for reversing the judgment below.[12]

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[9]Rule 11.11 of the Integration Rule.

[10]Id.

[11]Rule 3.7(i), Florida Appellate Rules.

[12]In addition, it is doubtful whether this Court has jurisdiction under 28 U.S.C., §1257, which authorizes review by certiorari of decisions rendered by the highest court of a state if "any title, right, privilege or immunity is *specially set up or claimed* under the Constitution . . .".

## CONCLUSION

Petitioner has demonstrated no reason for reviewing the decision below. No federal question was involved in the state proceedings. Even if a federal question had existed, petitioner, did not claim a constitutional right, either in the proceedings before the referee or in the Supreme Court of Florida. Thus, no federal question was decided by the court below, and the petition for certiorari should be denied.

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